ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions of the	)	
Telecommunications Act of 1996	)	
	)	
Joint Petition of BellSouth, SBC, and	)	
Verizon for Elimination of Mandatory	)	
Unbundling of High-Capacity Loops and	)	
Dedicated Transport	)	
	)	

COMMENTS OF

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The Joint Petition is nothing more than a contradictory and disingenuous attempt to convince the Commission to let the Bell Operating Companies ("BOCs") escape unbundling obligations with which they have never fully complied. In fact, the petition is inherently contradictory because the Joint Petitioners would not be seeking authority to impose a unilateral price increase if requesting carriers were not impaired without access to incumbent local exchange carrier ("ILEC") high capacity loops and dedicated transport. Indeed, were the BOCs correct that the wholesale market has been deluged under an "avalanche of metro capacity," they would never have filed this petition. Rather, they would have reacted to real market forces by reducing their prices to TELRIC levels (or below) to keep traffic on their own networks and deter competing carriers from building even more high-capacity loops and transport capacity. In fact, the BOCs have filed this petition to clear the way for price increases far beyond TELRIC levels, thereby indicating that the high-capacity loop and transport markets are not nearly as saturated with available capacity as they pretend. In a very real sense, the Joint Petition refutes itself because the relief it seeks is useful to ILECs only if the preconditions for removing UNEs have not been satisfied.

It is particularly offensive that the BOCs should file this petition – with misleading information about how well the CLEC industry is doing – at a time when the capital markets are largely closed to CLECs and many are filing for bankruptcy, on the verge of bankruptcy, or scaling back market entry plans for 2001. Much of the alleged CLEC investment upon which the Joint Petition attempts to rely was made by companies that have since gone into bankruptcy, including, for example, e.spire and Winstar. These recent bankruptcies are not the result of vigorous market conditions weeding out weak competitors. Rather, they reflect the fact

that more than five years after Congress passed the 1996 Act the ILECs still have market power and use this power to eliminate competition in violation of the Act. The time has come for the Commission to enforce the Act, not to lift statutory unbundling obligations in response to pressure from the BOCs.

Even if the claims that the Joint Petition makes about CLEC investment were accurate, and they are not, they would be irrelevant given the current state of the market. If CLECs that have been forced to install their own facilities, despite impairment, due to the ILECs' refusal to comply with the Act cannot earn a profit, the alternative facilities can hardly be relied upon as evidence that requesting carriers are not impaired without access UNEs. On the contrary, it demonstrates that the ILECs' failure to provide access to UNEs as required by the Act is harming competition, and the Commission's enforcement efforts have been insufficient. Current market conditions provide confirmation that the Commission must enforce the Act before it is too late. Under no circumstances may the alleged CLEC-installed facilities that the Joint Petition and USTA Report cite be used as the basis for removing UNE requirements with which the ILECs have yet to comply.

The data that the BOCs seek to provide is not new: it is the same old data that the Commission rejected in the UNE Remand Order. They have simply "updated" previous submissions with inaccurate and misleading information. The Commission based its decision to create the high-cap loop and dedicated transport UNEs based on concerns about ubiquity, and the disadvantage of putting together "patchwork" networks from a variety of different CLECs. On these points, the BOCs have not presented any new data. Rather, they have merely tried to distort the impair standard to serve their purposes, redefine the term "ubiquitous" so that it no longer means "ubiquitous," and implicitly threaten that they will not introduce advanced services

unless the Commission submits to their demands. The data quite simply does not address the impair standard that the Commission adopted in the UNE Remand Order at all. Therefore, both the Act and the Commission's rules require a prompt denial of the Joint Petition.

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To: The Commission

COMMENTS OF

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments in response to the Commission's *Public Notice* in the above-captioned proceeding.[1] CompTel is the premier industry association representing competitive telecommunications providers and their suppliers. CompTel's members provide local, long distance, international, Internet and enhanced services throughout the nation. It is CompTel's fundamental policy mandate to see that competitive opportunity is maximized for *all* its members, both today and in the future. In addition to these comments, CompTel endorses the

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[1] *Pleading Cycle Established for Comments on Joint Petition of BellSouth, SBC and Verizon*, CC Docket No. 96-98, Public Notice, DA 01-911 (rel. April 10, 2001) ("*Notice*"). *See also Common Carrier Bureau Grants Motion for Extension of Time for Filing Comments and Reply Comments on BOC Joint Motion Regarding Unbundled Network Elements,* CC Docket No. 96-98, Public Notice, DA 01-1041 (rel. April 23, 2001) (extending filing dates for comments to June 11, 2001 and for reply comments to June 25, 2001).

comments filed today by the CLEC Coalition, whose members consist of facilities-based CLECs with diverse networks and business plans.

The Joint Petition is a transparent attempt to circumvent both the explicit provisions of the 1996 Act as well as the Commission's rules regarding unbundling. The Joint Petitioners are using this proceeding as a forum simply to reiterate the arguments that the Commission rejected in the UNE Remand Proceeding. In the UNE Remand Order, the Commission explained that because UNEs "have not been made fully available to requesting carriers as the Commission expected in 1996, we do not know the extent to which competition will develop once all of the unbundling rules are actually implemented by incumbent LECs."[2] Unfortunately, we still do not know the extent to which competition will develop once the ILECs actually implement the unbundling rules because they still have not made UNEs fully available to requesting carriers. Indeed, the only thing that has changed is that the capital markets are now largely closed to CLECs, which means that it is more important than ever to ensure that requesting carriers have unbundled access to high-capacity loops and dedicated transport.

It is an insult to the Commission that the Joint Petitioners are now asking for UNEs to be removed from the list, which undermines the certainty that the Commission sought in adopting the UNE Remand Order and wastes the resources of the Commission, the CLECs, and the Joint Petitioners themselves, without even mentioning the process that the Commission created to review unbundling obligations. It is also offensive that the Joint Petition is based on a so-called "fact" report that is patently inaccurate, obviously misleading, and flatly inconsistent with market reality. Even if the report were accurate, it does not provide the types of data that

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2 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 11 (1999) ("UNE Remand Order").

the Commission considers in applying the impair standard. In fact, the Joint Petition as a whole does not even address the impair standard. Grant of the petition would also prevent competitive providers of local exchange services from using UNE combinations like the Enhanced Extended Link ("EEL"), which the Commission has recognized is crucial to fostering competition for local services because it allows new entrants to serve customers without having to collocate in every central office in the ILEC's territory. Therefore, the Commission should promptly deny the Joint Petition.

I. THE JOINT PETITION IS PREMATURE

The Commission should deny the Joint Petition without further consideration because it is premature, which undermines the goals of the review procedure established in the UNE Remand Order.[3] The Motion to Dismiss of NewSouth Communications provides ample basis for the Commission to dismiss the Joint Petition without further review, as CompTel explained in letter dated May 14, 2001.[4] The Commission created the three-year review procedure in order to balance the need periodically to review and modify the national list of UNEs as necessary to reflect changes in the "technology, competition and economic conditions of the telecommunications market"[5] with the need to promote competition by providing a measure of certainty in the marketplace.[6] The Commission designed the review procedure in order to "provide reasonable certainty regarding the availability of unbundled elements, thereby allowing requesting carriers to attract investment capital and move forward with implementing

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3 *Id.* at ¶¶ 148-51.

4 Letter dated May 14, 2001 from Jonathan D. Lee, CompTel, to Dorothy Attwood, FCC.

5 UNE Remand Order at ¶ 148.

6 *Id.* at ¶ 150.

national and regional business plans that will allow them to serve the greatest number of consumers."[7] Because a*d hoc* petitions like the Joint Petition "threaten the certainty that . . . is necessary to bring rapid competition to the greatest number of consumers,"[8] the Commission prohibited them by adopting a three-year time frame for reviewing the national list.[9]

The Joint Petition flouts the UNE Remand Order by failing even to mention the three-year review process let alone provide any justification for ignoring it. Filed less than three years since adoption of the UNE Remand Order and less than a year since adoption of some of the UNEs at issue here, the Joint Petition is precisely the type of *ad hoc* petition that threatens competition by introducing uncertainty into the market. In fact, the Joint Petition appears to be designed precisely to inject further uncertainty into the market.

Given current market conditions, it is unacceptable that the Joint Petition was filed outside of the Commission's review process without a sufficient factual predicate upon which the Commission could base a decision to amend the list of UNEs, or even a mention of the Commission's review process. The Joint Petition is based entirely upon a so-called "fact" report ("USTA Report") that is utterly unreliable. This report, which was prepared by an attorney for the ILECs, is deeply flawed both in its design and its assertions. As explained in more detailed below, the USTA Report grossly exaggerates every measure of competitive alternatives to ILEC high-capacity loop and dedicated transport UNEs that it purports to present. Therefore, the Commission should dismiss the Joint Petition outright, or, at a minimum, defer it until the three-year review cycle begins.

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7 *Id.* at ¶ 9.

8 *Id.* at ¶ 150.

9 *Id.* at ¶ 151.

II. THE JOINT PETITION DOES NOT ADDRESS THE IMPAIR STANDARD

The Joint Petition is incomprehensible until it is recognized for what it actually is: a late-filed petition for reconsideration of the UNE Remand Order that is based on a deeply-flawed report prepared by a lawyer for the ILECs and unsupported by any affidavits. The Joint Petitioners are seeking reconsideration because they cannot meet the impair standard that Congress adopted in the 1996 Act and that the Commission adopted in the UNE Remand Order. The Joint Petitioners have provided no "marketplace evidence" whatsoever that lack of access to high-capacity loops and dedicated transport would not impair a requesting carrier's ability to provide the services it seeks to offer. Accordingly, the Joint Petition seeks to lower the bar for the impairment standard by repeating the same arguments that the Commission rejected in the UNE Remand Order.

In essence, the Joint Petition asks the Commission to focus on a single service that a requesting carrier may seek to offer using UNEs rather than on the availability of the UNE itself.[10] With respect to this one service, the Joint Petition asks the Commission to focus on a few specific wire centers within certain MSAs rather than on the entire nation or even entire MSAs, because this is where they believe "there is likely to be demand for"[11] the single service the Joint Petition asks the Commission to consider. The Joint Petition then asks the Commission to focus on general proxies for availability of the UNEs – the alleged number of collocation arrangements and alternative facilities – with respect to the single service within the few specific wire centers they have targeted, claiming that where there is competition sufficient to justify pricing flexibility, lack of access to a UNE would not impair a requesting carrier's ability to

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10 *See, e.g.*, Joint Petition at 11, 19.

11 *See, e.g., id.* at 4.

provide the those services.[12] Finally, the Joint Petition claims that, even if the impair standard is not met, the Commission should remove certain UNEs from the national list because restricting access to wholesale inputs is necessary to foster retail competition and network expansion.[13]

The Joint Petition distorts the impair standard so greatly that it no longer resembles the impair standard that the Commission adopted in the UNE Remand Order. In that order, the Commission explained that Congress sought to foster "competition by fundamentally changing the conditions and incentives for market entry and by attempting to open any remaining local service bottlenecks."[14] Central to the new statutory scheme, the Commission explained, is section 251 of the Act, "which seeks generally to reduce inherent economic and operational advantages possessed by [ILECs]."[15] Congress therefore directed the Commission to implement section 251 by, among other things, determining which network elements should be unbundled. The impair standard that the Commission adopted in the UNE Remand Order was "designed to create incentives for both incumbent and competitive LECs to innovate and invest in technologies that will benefit consumers through increased choices of telecommunications services and lower prices."[16]

The extent to which the Joint Petition distorts the impair standard becomes readily apparent when the Joint Petition is compared to the UNE Remand Order itself. For example, the Commission emphasized in the UNE Remand Order that:

> One important purpose of the unbundling provisions of the Act is to permit competitive LECs to compete with the same economies

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12 *See, e.g., id.* at 10-14, 18-22.

13 *See, e.g., id.* at 29-32.

14 UNE Remand Order at ¶ 2 (emphasis added).

15 *Id.* at ¶ 3.

16 *Id.* at ¶ 5.

> as the incumbents, especially in the early stages of local competition, when their networks are limited in their reach, and their customer bases are necessarily small. The incumbent LECs still enjoy cost advantages and superiority of economies of scale, scope, and ubiquity as a result of their historic, government-sanctioned monopolies. These economies are now critical competitive attributes and would belong unquestionably to the incumbent LECs if they had "earned" them by superior competitive skills. These advantages of economies, however, were obtained by the incumbents by virtue of their status as government-sanctioned and protected monopolies. We believe that these government-sanctioned advantages remain barriers to the requesting carriers' ability to provide a range of services to a wide array of customers, and that their existence justifies placing a duty on the incumbent carriers to share their network facilities.[17]

The Joint Petition perverts the unbundling provisions of the Act by asking the Commission to lift the unbundling obligation solely on the basis of a simple and misleading count of alternative facilities in very limited geographic area.[18] The Joint Petition further claims that, even if competitors are impaired without access to these UNEs, the Commission must deny access in order to "advance the core Congressional objectives of promoting facilities-based competition and deployment of advanced services."[19] Thus, the Joint Petition has no relationship to the UNE Remand Order apart from quoting a few sentences out of context.

The Joint Petition more closely resembles a petition for pricing flexibility. However, the standard for pricing flexibility and the impair standard are designed to accomplish different goals and thus share very little similarity. Moreover, the Joint Petition provides no grounds that could justify a departure from the impair standard that the Commission adopted in the UNE Remand Order. Therefore, the Commission should deny the Joint Petition.

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17 *Id.* at ¶ 86 (footnotes omitted and emphasis added).

18 *See, e.g.*, Joint Petition at 10-14, 18-25.

19 *Id.* at 6.

A. The Joint Petition Improperly Focuses On One Service that Can Be Provided Using UNEs Rather than the UNEs Themselves.

The Joint Petition asks the Commission to focus on a single service – special access service – that can be provided using UNEs, rather than on the availability of the UNEs themselves.[20] Indeed, the first portion of the USTA Report argues that the market for special access service is a distinct market, and then discusses no other markets or services.[21] Similarly, the Joint Petition addresses no other services beyond special access service. However, the plain language of the 1996 Act requires the Commission to apply the impair standard to specific network functionalities, not specific services, as CompTel and others have repeatedly demonstrated.[22] Thus, even if the Joint Petition and the USTA Report were accurate, they would fail to demonstrate that any UNEs should be removed from the national list. By focusing solely on special access service, the Joint Petition and the USTA Report attempt to provide an answer – and a greatly distorted one at that – to the wrong question.

The wisdom of Congress in requiring the Commission to apply the impair standard to specific network functionalities rather than services is readily apparent. Congress recognized that technology – and the service offerings that technology permits – is evolving so rapidly that it is difficult for the law to keep pace. By focusing on network functionalities, Congress created a standard – the impair standard – that the Commission can apply without making dangerous, and ultimately unverifiable, assumptions about the current or future marketplace. Thus, the Commission can rely on currently available, and thus verifiable, data to

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20 *See, e.g., id.* at 11, 19.

21 *See* USTA Report at 2-5.

22 *See,* e.g., Comments of CompTel, CC Docket No. 96-98 (filed April 5, 2001); Reply Comments of CompTel, CC Docket No. 96-98 (filed April 30, 2001). For the sake of brevity, we do not repeat these demonstrations here. Rather, both filings are attached.

answer the question that the impair standard poses: whether the network element at issue is available today from third-parties or through self-provisioning such that a CLEC would not be impaired in entering the market without access to it as a UNE.

By contrast, it would have been impossible to apply the impair standard if Congress had required the Commission to focus on the services that can be provided using a particular network element. For example, the Commission cannot possibly determine the entire scope of services, including the characteristics of particular service offerings, that are currently being provided using the network element at issue, let alone all of the services that might be provided in the future. As such, the Commission could inadvertently prevent new and innovative services from being introduced if it failed to predict them – including not only the existence of the services but also the market share and revenues that they would generate – and thus consider them when applying the impair analysis.

The Commission would also have had to undertake an impair analysis for ***all*** network elements for ***every*** service that a requesting carrier seeks to offer now, or might seek to offer in the future, if Congress had required the Commission to apply the impair standard on a service-by-service basis. The Commission could not possibly complete such a massive undertaking. Even if it could complete such an analysis, the resulting use restrictions and rules would be so Byzantine that they alone would undermine competition and innovation. This result would be fundamentally inconsistent with the 1996 Act, which "set the stage for a new competitive paradigm in which carriers in previously segmented markets are able to compete in dynamic and integrated telecommunications market that promises lower prices and more innovative services to consumers."[23]

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[23] UNE Remand Order at ¶ 2.

The Joint Petition addresses none of these issues, and merely begins with an assumption that the only service that carriers provide now, and will provide in the future, using high-capacity loops and dedicated transport is special access service.[24] Similarly, the Joint Petition makes assumptions about the types of customers that CLECs currently serve, and will seek to serve in the future, using high-capacity loops and dedicated transport.[25] However, the Joint Petition provides no justification to support these assumptions. This is no surprise, because the assumptions are patently incorrect. For example, grant of the Joint Petition would end the use of UNE combinations like the EEL, which the Commission has recognized is crucial to fostering competition for **local services** because it allows new entrants to serve customers without having to collocate in every central office in the ILEC's territory.

The assumptions upon which the Joint Petition is predicated are inconsistent not only with the Act, but also with the impair standard that the Commission adopted in the UNE Remand Order. As the Commission recognized in the UNE Remand Order, "there will be a continuing need for all three arrangements Congress set forth in section 251 to remain available to competitors so that they can serve different types of customers in different geographic areas."[26] "For effective competition to develop as envisioned by Congress, competitors must have access to incumbent LEC facilities in a manner that allows ***them*** to provide ***the services that they seek to offer***, as contemplated in section 251(d)(2) of the Act."[27]

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24 *See, e.g.*, Joint Petition at 11, 19; USTA Report at 2-5.

25 *See, e.g.*, Joint Petition at 4, 9-11, 18, 22; USTA Report at 2-3.

26 UNE Remand Order at ¶ 5.

27 *Id.* at ¶ 13.

B. The Joint Petition Improperly Focuses Solely On a Few Specific Wire Centers Rather than on Ubiquitous Availability.

Throughout the vast majority of the Nation, no alternatives to the ILECs' high-capacity loops and dedicated transport are available to requesting carriers. This fact is beyond dispute, and the Joint Petition does not claim otherwise. Rather, the Joint Petition asks the Commission to consider only a very limited geographic area in applying the impair standard.[28] Specifically, the Joint Petition asks the Commission to focus on 25 percent of the commercial office buildings when considering high-capacity loops,[29] and on a few wire centers located within less than 57 percent of the MSAs that the ILECs serve when considering dedicated transport.[30] The Joint Petitioners argue that if alternatives to the ILECs' high-capacity loops and dedicated transport are available to requesting carriers in these limited locations, then they are "ubiquitously" available for the purposes of the impair standard.[31]

The Joint Petitioners recognize that their definition of "ubiquitous" is fundamentally inconsistent with the definition of "ubiquitous" that the Commission adopted in the UNE Remand Order, not to mention the definition in the Merriam-Webster Dictionary. They claim, however, that the Commission's conclusion in the UNE Remand Order that alternatives to the ILECs' network elements must be ubiquitously available to requesting carriers was predicated on "mistaken views" and "fundamental misunderstandings."[32] According to the Joint Petitioners, requesting carriers do not need access to the ILECs' high-capacity loops and dedicated transport throughout the ILECs' network – and thus the 1996 Act does not require the

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28 *See, e.g.*, Joint Petition at 10-14, 18-23.

29 *See id.* at 11-12.

30 *See id.* at 19-20.

31 *See, e.g., id.* at 10, 18.

32 *Id.*

ILECs to provide access to these network elements throughout their network – because a requesting carrier theoretically can compete with the ILECs by providing special access service only in those geographic areas where the ILECs today have chosen to earn the majority of their special access revenues.[33]

Under the Joint Petitioners' theory, alternatives to the ILECs' high-capacity loops are "ubiquitous" when they are available for 25 percent of the business office buildings, because ILECs earn 80 percent of their special access revenues from 20 percent of their wire centers and all users of high-capacity loops allegedly are businesses.[34] Similarly, because ILECs earn a high percent of their special access revenues from a low percent of the MSAs that they serve, they believe that alternatives to the ILECs' dedicated transport are "ubiquitous" when there is one collocator in wire centers covering 30 percent of special access revenues in those MSAs.[35]

The Joint Petitioners' theory is self-serving because, if adopted, it would mean that their obligation to provide access to UNEs would expire as soon as one competitor installs facilities in the geographic areas that have the highest profit potential. Thus, the ILECs could avoid the unbundling obligation altogether by refusing to comply with the Commission's decision to require unbundling of high-capacity loops and dedicated transport until competitors are forced to construct their own facilities, which will naturally occur first in the geographic locations with the highest profit potential, at which time the ILECs' unbundling duty would

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33 *See id.* at 10-14, 18-23.

34 *Id. at* 11-12. It is interesting to note that the Joint Petition makes no effort to show that the 25 percent of commercial office buildings where alternatives to the ILECs' high-capacity loops allegedly are available are located within the same 20 percent of the wire centers where the ILECs earn 80 percent of their special access revenue. Thus, alternative capacity is clearly insufficient to defeat a unilateral price increase by the ILECs.

35 *Id.* at 19.

expire due to the theoretical availability of alternatives. The Joint Petitioners' interpretation of the impair standard would place the ability to control access to UNEs solely within the hands of the ILECs. It would also limit the types of services and markets that requesting carriers could offer and serve because it is based entirely on the ILECs' services and target markets.

For these and other reasons, the Commission considered and rejected the arguments of the Joint Petitioners in the UNE Remand Order. The Commission acknowledged in the UNE Remand Order that not all CLECs will want to provide ubiquitous service across broad geographic areas.[36] However, the Commission emphasized that those CLECs who do want to provide ubiquitous service across broad geographic means will likely be disadvantaged vis-à-vis the incumbent, especially in the early stages of deployment, because the incumbent LEC will enjoy advantages of a ubiquitous network that provide them with economies of scale and the ability to reach all consumers in their service territories.[37] As the Commission explained in the UNE Remand Order,:

> Denying access to the incumbent's unbundled network elements, when use of alternative sources would materially diminish the competitors' ability to serve their intended area, would be inconsistent with the goal of the 1996 Act to bring competition to the greatest number of customers. Indeed, the inability to provide service ubiquitously may be especially important for competitive LECs seeking to serve residential and small business customers located throughout a state.[38]

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36 UNE Remand Order at ¶ 98.

37 *Id.*

38 *Id.*

Accordingly, the impair standard that the Commission adopted in the UNE Remand Order seeks to encourage the rapid introduction of competition in ***all*** markets, including residential and small business markets throughout the country.[39]

The Joint Petitioners have provided no justification for a departure from the impair standard that the Commission adopted in the UNE Remand Order, nor could they. Their discussion of ubiquity boils down to the assertion that alternatives to the ILECs' high-capacity loops and dedicated transport are available where the requesting carriers need them.[40] Of course, the Joint Petitioners assume that requesting carriers only need alternatives to the ILECs' high-capacity loops and dedicated transport where the ILECs earn the majority of revenues from these UNEs. However, the promise of the 1996 Act, as the Commission has recognized, lies in the fact that requesting carriers can use UNEs to provide whatever type of new and innovative services that they desire to any type of target market. Indeed, the 1996 Act would be a failure if the end result were only two, or even three, LECs providing the same types of services to the same target markets. For this reason alone, the Commission should reject the Joint Petitioners' distorted definition of "ubiquitous."

C. The Joint Petition Addresses the Pricing Flexibility Standard Rather than the Impair Standard.

The Joint Petition does not ask the Commission to apply the impair standard adopted in the UNE Remand Order to high-capacity loops and dedicated transport. Rather, the Joint Petition asks the Commission to apply the pricing flexibility standard in deciding whether to continue to require unbundling of high-capacity loops and dedicated transport. This is why

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39 *Id.* at ¶ 9.

40 *See* Joint Petition at 10-14, 18-23.

the Joint Petition urges the Commission to focus solely on special access service in those limited geographic locations where the Commission has granted pricing flexibility: if the pricing flexibility standard were the same as the impair standard, then the Joint Petitioners could rely on the Commission's grant of pricing flexibility for special access service to argue that high-capacity loops and dedicated transport should no longer be subject to unbundling.[41] In fact, the Joint Petitioners have no basis for arguing that high-capacity loops and dedicated transport should no longer be unbundled; they cannot demonstrate that the current impair standard that the Commission adopted in the UNE Remand Order has been satisfied, not even in those areas where the Commission has granted pricing flexibility.

In considering the Joint Petition, it is important to note that the Commission adopted the UNE Remand Order a few months after it adopted the pricing flexibility standard.[42] It is not surprising, therefore, that the ILECs urged the Commission to use the same collocation-as-proxy approach used in the pricing flexibility standard for the impair standard as well. The Commission explicitly rejected that approach in the UNE Remand Order, explaining that the pricing flexibility standard and the impair standard were designed to serve very different purposes.[43] The pricing flexibility rules allow ILECs to meet competitive transport entry with pricing flexibility where one requesting carrier is collocated in a serving wire center. They do not, however, "describe market conditions where requesting carriers would not be impaired without access to unbundled transport."[44] In the words of the Commission,

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41 *See id.* at 11, 19; USTA Report at 2-5.

42 *Access Charge Reform and Price Cap Performance Review for Local Exchange Carriers,* 14 FCC Rcd 14221 (rel. Aug. 27, 1999).

43 *See* UNE Remand Order at ¶¶ 131-32.

44 *Id.* at note 673.

> It is not appropriate to use these types of triggers to determine whether alternative sources of network elements are actually available as a practical, economic, and operational matter. . . . [T]he ability of ***one*** competitor to serve ***certain*** customers [i.e., special access customers] in a particular market is not indicative of whether, without unbundled access to incumbent LEC's facilities, competitive LECs could provide service to other customers in the same market or to customers in other markets. While the triggers we adopted in the *Pricing Flexibility Order* allow us to determine when an incumbent LEC can re-price services to respond to competition, they do not allow us to evaluate whether the incumbent LEC can withhold access to the inputs that requesting carriers need to provide competitive services in the first place.[45]

Therefore, a decision by the Commission that pricing flexibility is warranted has no bearing whatsoever on whether "the failure to provide access to a network element would 'impair' the ability of a requesting carrier to provide the services it seeks to offer."[46]

The Commission's decision in the UNE Remand Order that the pricing flexibility triggers are not appropriate triggers for the impair standard was not only reasonable, but also required under section 251. The pricing flexibility trigger, the existence of at least one collocation arrangement, is considered a proxy for sunk investment, which the Commission has concluded constrains ILEC pricing behavior for customers addressable through the competitive investment. Under the Commission's theory, even an empty collocation space may constrain ILEC retail pricing behavior somewhat because aggressive pricing may invite a competitor to begin using the collocation space (assuming, of course, that the requisite loop and transport elements are available to allow the competitor to efficiently use the collocation space), which theoretically can be geared up quickly enough to defeat a ILEC price increase. With respect to the impair standard under section 251, however, an empty collocation cage is useless. If a CLEC

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45 *Id.* at ¶¶ 131-32 (emphasis added).

46 *Id.* at ¶ 51.

needs a functionality today, the possibility that it or some other CLEC might be able to install equipment in an existing collocation arrangement is no answer. In fact, of the alternative facilities that are available at wholesale, most *are not* accessible through ILEC central office based collocation. Section 251 requires ILECs immediately to provide access to unbundled network elements if a requesting carrier is impaired without them: it does not allow ILECs to withhold access to unbundled network elements based on the expectation that alternative facilities may be available in the future.

In addition to the competitive reasons why the pricing flexibility and similar type triggers are insufficient for the purposes of section 251, there are administrative reasons why the impair standard is much more stringent than the pricing flexibility standard. For example, even with pricing deregulation, the ILECs still must tariff the service, and carrier customers can file section 208 complaints to challenge excessive or discriminatory rates. The tariff requirement and complaint procedures serve as regulatory safeguards in the event that the sunk investments that triggered pricing flexibility prove to be insufficient to constrain ILEC retail pricing behavior. By contrast, there are fewer regulatory safeguards with respect to UNEs. Once the Commission decides to remove a network element from the UNE list, a requesting carrier has no way to obtain that functionality at mandatory TELRIC rates even if lack of access to that element materially diminishes its ability to provide the services it seeks to offer."[47]

The Joint Petitioners provide no basis for the Commission to depart from its conclusion in the UNE Remand Order that proxies for standards designed to determine whether there are competitive constraints on an ILEC's ability to set prices – like the pricing flexibility

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47 *Id.*

standard – are not appropriate for the impair standard. Nor could they, because nothing has changed since the Commission adopted the UNE Remand Order.

D. The Joint Petition Fails To Provide the Types of Data that the Commission Considers in Applying the Impair Standard.

In the UNE Remand Order, the Commission concluded that "the failure to provide access to a network element would 'impair' the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer."[48] The Commission emphasized that the impair standard takes into consideration not only whether "alternatives outside the incumbent LEC's network exist,"[49] but also "whether those alternatives are ***actually available*** to the requesting carrier as a ***practical, economic and operational*** matter."[50]

The Joint Petition provides no factual documentation to support its claim that "alternatives are actually available to the requesting carrier as a practical, economic and operational matter." Essentially, the Joint Petition and the USTA Report are based solely upon a simple count of the number of carriers, wholesale local fiber suppliers and IXCs that allegedly (1) provide competitive access service, (2) have operational or **planned** collocation facilities," or (3) have operational or **planned** fiber networks, as well as the number of commercial office buildings that allegedly are served by CLEC fiber. However, neither the Joint Petition nor the USTA Report makes any attempt to show that these theoretical sources of alternative facilities

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48 *Id.*

49 *Id.* at ¶ 6.

50 *Id.* (emphasis added).

are actually available today to requesting carriers on a ***practical, economic and operational*** basis. Likewise, neither the Joint Petition nor the USTA Report even attempts to compare entry using UNEs with entry using self-provided or alternative facilities.

Even if the USTA Report were accurate, a simple count of planned and operational facilities is not sufficient to satisfy the impair standard. This is because the "impair" standard does not require that lack of access to an unbundled element "deny" the ability of a competitor to provide the services that it seeks to offer.[51] In the UNE Remand Order, the Commission rejected the "deny" impair standard proposed by the ILECs, concluding that "the failure to provide access to a network element would 'impair' the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element ***materially diminishes*** a requesting carrier's ability to provide the services it seeks to offer."[52]

The Commission also rejected the ILECs' argument that "if an efficient competitor can and does provide service without access to the incumbent's network element, it is irrelevant whether a less efficient competitor might claim that it would be impaired without access to the element."[53] The Commission found that the "efficiency" argument is more relevant to the length of time a competitor has been in business than to the efficiencies created by the

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51 Indeed, the difference between the impair standards proposed by the CLECs and the ILECs in the UNE Remand Proceeding was "essentially the difference between whether lack of access to an unbundled network element "denies" or "materially diminishes" the ability of a competitor to provide the services it seeks to offer." *Id.* at ¶ 50.

52 *Id.* at ¶ 51 (emphasis added).

53 *Id.* at ¶ 53.

competitor's inherent capabilities or cost structure."[54] The Commission instead concluded that "the Act is not calibrated to the performance of the company whose business plan allows it to rely the least on the incumbent LEC's network elements."[55] In the words of the Commission, the:

> Provisions of the 1996 Act do not contemplate that either the incumbent LEC or the regulator will determine whether a particular carrier is "efficient." Rather, the Act is designed to create a regulatory framework that requires incumbent LECs to make network elements subject to the requirements of section 251(d)(2), and allows the marketplace to determine ultimately which competitors thrive or survive.[56]

Therefore, "the ability of one or more competitors to serve certain customers in a particular market is not dispositive of whether competitive LECs without unbundled access to the incumbent LEC's facilities are able to compete for other customers in the same market or for customers in other markets."[57]

For similar reasons, the Commission rejected the ILECs' argument that it must look at each UNE in isolation to determine whether or not that element independently satisfies section 251(d)(2).[58] As the Commission explained, such an analysis "fails to reflect the manner in which carriers interconnect their networks, and ignores factors that would impair a requesting carrier's ability to actually provide service, which is the focus of section 251(d)(2)(B). Even if a particular element may be purchased outside of the incumbent LEC's network at reasonable prices, other factors, including the costs and delays associated with collocation arrangements, as

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54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.* at ¶ 54.

58 *Id.* at ¶ 63.